

General Information Letter: Corporation succeeding to tax the attributes of an acquired corporation under IRC Section 381 succeeds to Illinois net loss carryforwards of the acquired corporation.

October 26, 2000

Dear:

This is in response to your letter dated October 23, 2000, in which you request a letter ruling. The nature of your request and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), which may be found on the Department's web site at [www.revenue.state.il.us](http://www.revenue.state.il.us).

In your letter you have stated the following:

I have a question regarding net operating losses and the provisions for their carry forward. I have a company (Company A, an S corporation) who operated in Illinois during the calendar years 1997 and 1998. In 1997, Company A had a substantial net operating loss. Company A had taxable income in 1998, but the net operating losses in Illinois sustained in 1997 were greater than the Illinois taxable income in 1998, leaving net operating losses carrying forward to January 1, 1999. On January 1, 1999, Company A merged into Company X, another S corporation and a related part to Company A before the merger, having the same constructive ownership as Company A.

My question is, can the net operating losses carried over from Company A be used to offset taxable income of Company X in 1999?

### **Response**

Section 405 of the Illinois Income Tax Act (35 ILCS 5/405) provides:

(a) In the case of the acquisition of assets of a corporation by another corporation described in Section 381(a) of the Internal Revenue Code, the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, all Article 2 credits and net losses under Section 207 of the corporation from which the assets were acquired.

\* \* \*

(b-5) No limitation under Section 382 of the Internal Revenue Code or the separate return limitation year regulations promulgated under Section 1502 of the Internal Revenue Code shall apply to the carryover of any Article 2 credit or net loss allowable under Section 207.

Section 381(a)(2) of the Internal Revenue Code provides that a corporation that acquires the assets of another corporation under a statutory merger under Section 368(a)(1)(A) of the Internal Revenue

Code will succeed to the tax attributes of the acquired corporation. Accordingly, the Illinois net losses of a Subchapter S corporation merged into a second Subchapter S corporation are available to be carried forward by that second Subchapter S corporation.

I assume that your letter mentions the identity of ownership before and after the merger because of concerns about limitations on loss carryforwards under Section 382 of the Internal Revenue Code, which limits losses that may be carried forward from a period prior to certain ownership changes to the period after the ownership change occurs, or under a similar provision of Illinois law. Section 405(b-5) of the Illinois Income Tax Act provides that no limitation under Section 382 of the Internal Revenue Code shall apply to Illinois net losses, and there is no provision similar to Section 382 in the Illinois Income Tax Act. Accordingly, a Subchapter S corporation that succeeds to the Illinois net losses of another Subchapter S corporation under Section 405 of the Illinois Income Tax Act will not need to limit those losses as a result of an ownership change.

As stated above, this is a general information letter which does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b). If you have any further questions, you may contact me at (217) 782-7055.

Sincerely,

Paul S. Caselton  
Deputy General Counsel -- Income Tax